Supreme Court, U. S.
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No. 268

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

HYMAN RADZANOWER,

Petitioner,

against

THE FIRST NATIONAL BANK OF BOSTON,

Respondent,

and

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION, JACK K. COOKE, RAYMOND P. SHAFER, W. J. BRESNAN, H. J. SCHAFLY, LEONARD TOW, R. C. TODD, JR., B. P. SIMON, J. B. GREEN, L. H. READ, R. G. WILSON, H. E. FLAHERTY, B. D. FISCHMAN, BERLE ADAMS, MARVIN CARTON, R. F. LEWIS, P. L. LOWE, CHARLES LUCKMAN, M. B. MITCHELL, A. E. PUCKETT, J. H. RICHARDSON, M. E. LIVINGSTON, and JACK WRATHER,

Defendants.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHASE MANHATTAN BANK, N.A., *AMICUS CURIAE*

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COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE CHASE MANHATTAN BANK, N.A., *AMICUS CURIAE*[1]

QUESTION PRESENTED

Whether, in determining the venue of an action under the Securities Exchange Act of 1934 ("the 1934 Act"), 15 U.S.C. §§ 78a, *et seq.*, against a national banking associa-

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[1] This brief is submitted with the consent of the parties.

tion, the venue provision of the 1934 Act, applicable to actions brought thereunder, 15 U.S.C. § 78aa, is to be construed as having repealed by implication the special venue provision of the National Bank Act of 1864, 12 U.S.C. § 94, applicable to actions brought against national banking associations.

STATUTES INVOLVED

The venue provision of the 1934 Act (Section 27), 15 U.S.C. § 78aa, provides:

> "... Any criminal proceeding may be brought in the district wherein any act or transaction constituting the violation occurred. Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be served in any other district of which the defendant is an inhabitant or wherever the defendant may be found."

The venue provision of the National Bank Act, 12 U.S.C. § 94, provides:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

STATEMENT

In this action under Section 10(b) of the 1934 Act in the District Court for the Southern District of New York the

defendants included respondent First National Bank of Boston, a national banking association established in Boston, Massachusetts.

Respondent moved to dismiss the action as to it on the ground that under Section 94 of the National Bank Act it could be sued only in the district in which it was established. Petitioner-plaintiff, in opposing the motion, argued that respondent had waived Section 94 by filing with the New York Superintendent of Banks a designation to receive process on its behalf. In an opinion dated October 21, 1974, the District Court rejected this contention and dismissed the action. The Court of Appeals for the Second Circuit affirmed without opinion on May 23, 1975.

In his petition for certiorari, petitioner virtually abandoned his waiver point and advanced a new argument for reversal of the dismissal on the ground that Section 27 of the 1934 Act should be construed to repeal by implication Section 94 of the National Bank Act. Since petitioner chose to assert this claim late in the litigation, it was not considered by the court below.

THE INTEREST OF THE CHASE MANHATTAN BANK, N.A.

The Chase Manhattan Bank, N.A. ("Chase") is a national banking association, having its principal office in New York City. From time to time Chase has been a defendant in actions commenced in or sought to be transferred to jurisdictions outside of New York involving the applicability of Section 94, including actions in which its implied repeal was considered.[2] Chase is vitally concerned that this Court uphold the protection afforded by the National Bank Act against disruptive litigation against national banks away from their headquarters.

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[2] See, e.g., *Wyndham Assoc.* v. *Bintliff*, 398 F.2d 614 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968), and *Aloha Airlines, Inc.* v. *Hawaiian Airlines, Inc.*, 58 F.R.D. 429 (D.Hawaii 1973).

ARGUMENT

POINT I

Venue in an action against a national bank under the 1934 Act is governed by the National Bank Act and not by the 1934 Act.

The principles which govern this case are well established by decisions of this Court. In *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963) and *Michigan Nat'l Bank* v. *Robertson,* 372 U.S. 591 (1963), the Court, finding the provisions of Section 94 to be "mandatory," held that a transitory action against a national bank must be brought in one of the places specified by Section 94, even though other venue statutes might permit suit elsewhere. In so holding, the Court reaffirmed the rule it had earlier laid down in *Stonite Prods. Co.* v. *Melvin Lloyd Co.,* 315 U.S. 561 (1942) and *Fourco Glass Co.* v. *Transmirra Prods. Corp.,* 353 U.S. 222 (1957), holding that a venue provision covering a specific subject (patent infringement) must prevail over the federal venue statute of general application and greater latitude.

Section 94 applies to a specific class of defendants—national banks—whose organization and operation are controlled by other provisions of the National Bank Act (12 U.S.C. §§ 1 *et seq.*). In contrast, Section 27 of the 1934 Act is generally applicable to all actions under the 1934 Act, regardless of the type of defendant. The clear conclusion appears to be that Section 94, and not Section 27, controls in actions against national banks, and that this action could have been commenced only in the District of Massachusetts, where respondent is established.[3]

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[3] Under Section 94 a national bank is "established" in the district where its principal place of business, as specified in its charter, is located. *Buffum* v. *Chase Nat'l Bank,* 192 F.2d 58 (7th Cir. 1951), *cert. denied,* 342 U.S. 944 (1952); *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F.Supp. 699 (S.D.N.Y. 1966).

However, it is here urged, as it has repeatedly been urged in other cases, that Section 27 should be read to repeal Section 94 by implication.

Most courts which have considered the argument, including the Second and Ninth Circuits, have rejected it.[4]

The Court of Appeals for the Third Circuit held to the contrary in *Ronson Corp.* v. *Liquifin Aktiengesellschaft,* 483 F.2d 852 (3d Cir. 1973).[5] There the court upheld venue in the District of New Jersey against a national bank established in Brooklyn, New York. In so holding, the Court relied on what it believed to be a liberal construction of the 1934 Act:

> "We are guided by the realization that the Securities Exchange Act must be liberally interpreted in order to accomplish the congressional objects of regulating the securities market and of affording proper disclosure to the investing public, as well as preventing fraud in securities trading. In recognition of the national rather than local nature of the transactions involved, Congress enlarged the applicable venue and service of process requisites. An unduly narrow ruling on venue could not but inhibit and reduce the effectiveness of the remedies provided by the Act." 483 F.2d at 854

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[4] *First Nat'l Bank* v. *United States District Court,* 468 F.2d 180 (9th Cir. 1972); *United States Nat'l Bank* v. *Hill,* 434 F.2d 1019 (9th Cir. 1970); *Klein* v. *Bower,* 421 F.2d 338 (2d Cir. 1970); *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.,* 394 F.2d 300 (2d Cir.), *cert. denied,* 393 U.S. 855 (1968); *Odette* v. *Shearson, Hammill & Co.,* 394 F.Supp. 946 (S.D.N.Y. 1975); *McClung* v. *LaSalle Nat'l Bank,* 387 F.Supp. 977 (S.D.Iowa 1975); *Allied Steel & Tractor Prods. Inc.* v. *First Nat'l City Bank,* 54 F.R.D. 256 (N.D. Ohio 1971); *Rome* v. *Eltra Corp.,* 297 F.Supp. 314 (E.D.Pa. 1969); *General Elec. Credit Corp.* v. *James Talcott, Inc.,* 271 F.Supp. 699 (S.D.N.Y. 1966)

[5] See also *Carpenter* v. *Hall,* 352 F.Supp. 806 (S.D.Tex. 1972); *Levin* v. *Great Western Sugar Co.,* 274 F.Supp. 974 (D.N.J. 1967).

In reaching this result, the Third Circuit misapplied the standards of construction repeatedly enunciated by this Court. As stated in *Washington* v. *Miller,* 235 U.S. 422, 428 (1914),

> ". . . where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is . . . that the special is intended to remain in force as an exception to the general."

In the context of the 1934 Act, the Court stated in *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963), that "[r]epeal is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent possible." This standard was recently applied in *Gordon* v. *New York Stock Exchange,* 95 S.Ct. 2598 (1975), holding that former Section 19(b)(9) of the 1934 Act, by authorizing commission fixing by securities exchanges, repealed by implication Section 1 of the Sherman Act (15 U.S.C. § 1). In so holding, the Court pointed out that prior to enactment of the 1934 Act Congressional hearings had adduced testimony concerning the long-standing practice of exchange commission fixing. In the Court's view, the 1934 Act "reflected" this legislative history. 95 S.Ct. at 2602-04.

Gordon makes plain that a necessary condition for implied repeal is evidence of a "clear and manifest" intent by Congress to effect that result. *United States* v. *Borden Co.,* 308 U.S. 188 (1939). The Court consistently has relied upon Congressional deliberations to determine that intent. For example, in *United States Alkali Export Ass'n* v. *United States,* 325 U.S. 196 (1945), the Court was faced with the question whether the Webb-Pomerene Act (15 U.S.C. §§ 61 *et seq.*) had repealed by implication the Sherman Act. The Court noted that in the reports of Congressional committees there was only a vague reference to the "precise problem

presented by the present case." In rejecting the argument for implied repeal, the Court stated: "The absence of more extended discussion of the matter is in itself persuasive evidence that there was no purpose to repeal" the earlier act. 325 U.S. at 210-11.

Even where the legislative history has disclosed consideration of the pertinent issues, the Court has still refused to find an implied repeal. Recently, in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974), the question was whether the Reorganization Act (45 U.S.C. §§ 701 *et seq.*) had impliedly repealed the Tucker Act (28 U.S.C. § 1491), dealing with claims against the United States. While noting legislative discussion of the possibility of limiting claims against the government, the Court rejected the inference of a repeal by implication, stating, "[t]he most that can be said is that the Rail Act is ambiguous on the question." 419 U.S. at 133. Accord, *Penn Dairies* v. *Milk Control Comm'n,* 318 U.S. 261 (1943) (repeal is "not to be implied where the legislative command, read in the light of its history, remains ambiguous.")[6]

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[6] A reflection of the Court's strict standards for implied repeal is the paucity of cases supporting that result. In *Friends of the Earth* v. *Armstrong,* 485 F.2d 1 (10th Cir. 1973) (dissent), *cert. denied,* 414 U.S. 1171 (1974), Chief Judge Lewis reviewed the cases up to that time, finding one instance in which implied repeal had been upheld (*Mathews* v. *United States,* 123 U.S. 182 (1887)), but a "multitude of cases" in which it had been rejected: *Universal Interpretive Shuttle Corp.* v. *Washington Metro. Area Transit Comm'n,* 393 U.S. 186 (1968); *Jones* v. *Mayer Co.,* 392 U.S. 409 (1968); *Amell* v. *United States,* 384 U.S. 158 (1966); *United States* v. *Welden,* 377 U.S. 95 (1964); *United States* v. *Zacks,* 375 U.S. 59 (1963); *United States v. Philadelphia Nat'l Bank,* 374 U.S. 321 (1963); *Silver* v. *New York Stock Exchange,* 373 U.S. 341 (1963); *Mercantile Nat'l Bank* v. *Langdeau,* 371 U.S. 555 (1963); *Bulova Watch Co.* v. *United States,* 365 U.S. 753 (1961); *Fourco Glass Co.* v. *Transmirra Prods. Corp.,* 353 U.S. 222 (1957); *Rosenberg* v. *United States,* 346 U.S. 273 (1953); *Federal Trade Comm'n* v. *A.P.W. Paper Co.,* 328 U.S. 193 (1946); *United States* v. *Borden Co.,* 308 U.S. 188 (1939); *Posadas* v. *National City Bank,* 296 U.S. 497 (1936); *United States* v. *Noce,* 268 U.S. 613 (1925); *United States* v. *Greathouse,* 166 U.S. 601 (1897).

In this case, there is not even "ambiguous" legislative history—there is simply none at all. In view of this complete legislative silence, Judge Friendly concluded in *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co.*, 394 F.2d 300, 304 (2d Cir.), *cert. denied*, 393 U.S. 855 (1968): "if the problem [repeal of § 94 by § 27] had occurred to Congress, we cannot be at all certain how that body would have wished it resolved." In so holding, the Second Circuit, along with most other courts, followed the decisions of this Court requiring evidence not only that Congress specifically considered the possibility of a conflict between earlier and later statutes but also that Congress intended to repeal the earlier one.

The Third Circuit in *Ronson* reached a result at odds with other courts because of a failure to apply this standard. The Third Circuit was apparently guided by the erroneous belief that legislative silence supports a conclusion of implied repeal:

> "[We] believe that the failure to mention national banks in this setting implies a congressional intent to include them among those governed by the more liberal standards of the Securities Exchange Act."[7] 483 F. 2d at 854

Ultimately, the court in *Ronson* rested not on legal precedent but on a policy judgment that the objectives of the 1934 Act would be achieved by an implied repeal of Section 94.

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[7] The court in *Ronson* also reasoned that since the 1934 Act, along with the Securities Act of 1933, refers specifically to national banks, (e.g., in U.S.C. § 781(i)), the absence of such reference in Section 27 evidences an intent not to exempt national banks from that venue provision. Section 781(i) does no more than vest the Comptroller of the Currency, rather than the SEC, with regulatory authority over national banks. Indeed, the failure to mention national banks in the venue section is easily explained by the fact that since they were already covered by Section 94, there was no need to exempt them specifically from Section 27.

Although the Third Circuit did not address this issue specifically, it might be argued that since Section 94 requires suit against a national bank in the forum where it is established, the section would disadvantage a plaintiff desiring to sue all potential defendants in one forum. Regardless of whether this may or may not be true in any given case, this Court has already disposed of the same argument in *Mercantile Nat'l Bank, supra,* by stating that a broader venue statute is for Congress—not the Court—to consider:

> "The consequence of our decision, appellee says, is that a litigant will be unable to join two national banks in the same action . . . if they are located in different districts . . . such a situation is a matter for Congress to consider . . . even if all of the 145 defendants [in the instant case] may not be sued in one proceeding . . . this, of course, is insufficient basis for departing from the command of the federal statute." 371 U.S. at 563-64

The so-called policy considerations afford little support to the argument for implied repeal. Since Section 27, in contrast to Section 94, is a broad venue statute, the effect of repealing Section 94 by implication would be far-reaching. Rather than requiring suit against a national bank in one district, it would permit suit in any district where the bank "transacts business" or where any of the allegedly illegal acts may have occurred. Thus, the issue is not simply, as it was in *Ronson,* whether a Brooklyn bank must defend a suit in New Jersey. The issue is whether a Boston bank will be required to defend in California (*First Nat'l Bank* v. *United States District Court, supra*), a New York bank in Ohio (*Allied Steel & Tractor Prods. Inc.* v. *First Nat'l City Bank, supra*), or a Chicago bank in Iowa (*McClung* v. *LaSalle Nat'l Bank, supra*).

Although it might be argued that the burdens of defending in far-removed forums may now be less than when Section 94 was enacted, national banks nonetheless still perform

a public function under the supervision of the Comptroller of the Currency. See *Bruns, Nordeman & Co.* v. *American Nat'l Bank & Trust Co., supra.* Whether the defense of suits in foreign jurisdictions would be an unacceptable burden is a matter for legislative determination, as contemplated by this Court in *Mercantile Nat'l Bank.* Despite the invitation in the Court's opinion in that case, decided thirteen years ago, Congress has made no attempt to amend or repeal Section 94. As this Court noted in *Georgia* v. *Pennsylvania R.R. Co.*, 324 U.S. 439 (1945), Congressional inaction is strong evidence against a repeal by implication.

CONCLUSION

The issue being one for resolution by Congress, the decision below should be affirmed.

Respectfully submitted,

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